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No.

In the Supreme Court of the United States

October Term, 1982

PARSONS & WHITTEMORE ALABAMA MACHINERY AND SERVICE CORPORATION and PARSONS & WHITTEMORE, INC.,
Petitioners,

vs.

YEARGIN CONSTRUCTION COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

GRIFFIN B. BELL
FRANK C. JONES
(Counsel of Record)
KING & SPALDING
2500 Trust Company Tower
Atlanta, Georgia 30303

JAMES E. CLARK
THOMAS R. ELLIOTT, JR.
LONDON, YANCEY, CLARK & ALLEN
2100 First National Southern Natural Building
Birmingham, Alabama 35203
Attorneys for Petitioners

Of Counsel:
ROBERT BRAUNSCHWEIG
WACHTELL, MANHEIM & GROUF
30 Rockefeller Plaza
New York, New York 10020

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED FOR REVIEW

1. Whether an arbitration award may be set aside under the Federal Arbitration Act, 9 U.S.C. §10, because of an *appearance of bias* on the part of an arbitrator.

2. Whether the decision of the Court of Appeals, which in effect requires a showing of *actual bias* as a basis for setting aside an arbitrator's award, is in conflict with this Court's decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968) (*"Commonwealth Coatings"*).

PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding below.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

THE OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit appears in the appendix. That opinion has not been published.

JURISDICTION

The judgment below in favor of respondents was rendered and entered on August 5, 1982. Petitioners sought rehearing by petition dated August 25, 1982. That petition was denied October 21, 1982.

The jurisdiction of this Court to review the decision of the Court of Appeals by writ of certiorari is invoked pursuant to Rule 17.1(c) and (a) of this Court. The

court below, in determining whether an arbitration award should be vacated under the Federal Arbitration Act, 9 U.S.C. §10 because of the bias or partiality of an arbitrator, applied a test in conflict with that mandated by this Court in *Commonwealth Coatings*. There are additional grounds for a grant of certiorari in that the standard announced in *Commonwealth Coatings* has been the subject of conflicting interpretations and applications by various federal courts of appeal. See Rule 17.1(a) of the Supreme Court.

STATUTES

This case arises under the Federal Arbitration Act ("the Act"), 9 U.S.C. §§1-14, and most particularly under Sections 9 and 10 of the Act. Section 9 provides for confirmation of an arbitration award by a federal district court; Section 10 alternatively sets forth statutory grounds which justify vacation of the award, including corruption, fraud, and evident partiality on the part of an arbitrator. The text of Sections 9 and 10 of the Act is set forth fully in the Appendix.

STATEMENT OF THE CASE

This case arises out of a dispute over the construction of a pulp mill in the Northern District of Alabama. [Tr. 612.][1] The owners of the project, Parsons & Whittemore Alabama Machinery and Services Corporation and Parsons and Whittemore, Inc. (petitioners, hereafter collectively referred to as "P&W"), acted as their own prime contractor,

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1. References designated "Tr. ....." are to the transcript of the proceeding in the district court. References to the record on appeal appear as "R. ....." References to depositions are by the last name of the deponent, e.g., "Barge at ....." The record has not at this time been certified and transmitted to the Court.

contracting directly for the civil, mechanical, and electrical work to be performed.

In the course of construction a dispute arose between P&W and the mechanical subcontractor, Yeargin Construction Company (respondent, and hereafter "Yeargin"), which eventually resulted in P&W's terminating Yeargin's contract and completing the mechanical work. [Tr. 572.] Yeargin's and P&W's claims against each other were arbitrated before a three-man panel selected pursuant to the procedures of the American Arbitration Association ("the Association"). [R. 1-23, 42.] At issue was a total of approximately $14 million in claims by both parties. [Tr. 574.] In the largest award ever entered by the Association in its southeastern region of Georgia, Alabama, and Tennessee [Johnson at 38], the arbitration panel awarded Yeargin $5.3 million in damages, resulting from the alleged wrongful termination of Yeargin and P&W's purported delay of both the project schedule and Yeargin's performance. [R. 77; Poppleton at 38.]

Pursuant to the Federal Arbitration Act, 9 U.S.C. §10, P&W filed a petition for vacation of the award in the United States District Court for the Northern District of Alabama, charging that the proceedings before the panel had been flawed by a number of improprieties which denied P&W a fundamentally fair hearing. [R. 74-93.][2] Chief among those improprieties was the failure of an arbitrator to disclose three separate relationships with Yeargin.[3] First, the arbitrator had previously attended

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2. Yeargin also petitioned under Section 9 of the Act for confirmation of the award.

3. Also included among P&W's complaints about the hearing it received were the arbitrators' failure to postpone the hearing for good cause shown; their failure to allow P&W to present rebuttal testimony; and repeated failures by the panel and the Association to follow the Association's rules and procedures.

a seminar on construction scheduling conducted by James Waldron, Yeargin's sole witness on delay damages (alleged to exceed three million dollars). [Tr. 15-16, 578.] Second, that same arbitrator had been sufficiently impressed by Waldron's expertise to arrange for Waldron to teach another seminar to his employees; the subject of the seminar was the very topic encompassed in Waldron's expert testimony for Yeargin at the arbitration hearing. [Tr. 17, 579-80.] Finally, the company which the arbitrator served as vice-president was general contractor on a North Carolina construction project on which Yeargin performed as a subcontractor. [Tr 577-78, 581-82.]

Despite the Association's own rule that an arbitrator is under a "continuing duty" to disclose any relationship with a party or a witness of which he became aware at any stage of the arbitration, *the arbitrator never disclosed any of these past connections to P&W.* When the arbitrator learned that Waldron was to be a major witness, he revealed his past acquaintance with Waldron to a fellow member of the panel, but the connection was not disclosed to P&W by either arbitrator. [Tr. 577-78; Poppleton at 54.]

The arbitrator's omission was compounded by his continuing concealment of the Waldron relationship during post-award discovery. When questioned about any acquaintance he might have had with any witness, the arbitrator testified merely that he had taken a scheduling seminar under Mr. Waldron some "ten to fifteen years ago." [Morton at 51.] He made no mention that he had in 1975 employed Mr. Waldron to instruct his own employees, and to the contrary testified:

"Q. Was that [the seminar attended by the arbitrator] the only occasion that you had to know Mr. Waldron?

A. Yes."

[Morton at 53.] It was only through P&W's subsequent investigation that the true facts were learned.

The district court expressly found that each of the past associations with Waldron should have been disclosed [Tr. 580], but declined to set the award aside since the court found the concealment had not materially affected the outcome of the arbitration. [Tr. 580, 609.]

P&W appealed the district court's confirmation of the award, pointing out that the trial court had applied the same "actual bias" test which had been rejected by this Court in *Commonwealth Coatings*. In that case the Court instead established a *per se* rule that any failure by an arbitrator to disclose a past business or personal relationship - however innocent - creates an *appearance of bias* sufficient to justify invalidation of the award. *Commonwealth Coatings* at 148-49.

The Court of Appeals for the Eleventh Circuit, in affirming the district court, continued the misapplication of *Commonwealth Coatings*. While the Court of Appeals conceded that the plurality opinion in *Commonwealth Coatings* applied an "appearance of bias" test [slip op. at 14], the Court then engaged in an analysis which leaves little doubt that the standard which was in fact applied was that of actual bias. The Court engaged in a lengthy examination of the challenged relationships and the likelihood that those associations would have had any palpable effect on the arbitrator's objectivity. In focusing on the probable effect of the relationships rather than simply on the arbitrator's continuing concealment of them, the Court of Appeals joined a number of other courts which have offered varying, conflicting and often confused interpretations of the test required by *Commonwealth Coatings*.

ARGUMENT

The facts summarized above illuminate the need for a grant of certiorari if Section 10 of the Federal Arbitration Act, 9 U.S.C. §10, is to be uniformly applied in the federal court system. Not only is the decision below in conflict with the rule announced by this Court in *Commonwealth Coatings;* it joins a number of other opinions which have applied varying constructions of that precedent to measure the possible bias of an arbitrator. Although all claim to be guided by *Commonwealth Coatings,* the courts have diverged as to whether the "partiality" described in 9 U.S.C. §10 as one of the grounds for setting aside an award means "actual bias in fact" or merely an "appearance of bias."

P&W's petition has especial importance at a time when arbitration is being urged as a solution to the overcrowded court system. If parties have no assurance that they will receive a fundamentally fair hearing at the hands of an arbitration panel, they will surely be reluctant to elect arbitration, since in so choosing they effectively abandon the procedural and appellate safeguards of the courts.

The comparative freedom of arbitration awards from judicial review is well established. Awards are presumed to be valid; formal rules of evidence and procedure need not be followed; arbitrators are not required to give reasons for their decision; and awards are not reviewable for errors of fact or law. *Bernhardt v. Polygraphic Co.,* 350 U.S. 198 (1956); *Wilko v. Swan,* 346 U.S. 427 (1953).

It is precisely this plenary power of arbitrators which compelled the Supreme Court to hold that an arbitrator

must disclose any dealings which might create an impression of possible bias. In the leading case of *Commonwealth Coatings*, the Supreme Court outlined the constitutional dimensions of an arbitrator's duty to disclose: where that obligation is breached, the award may be set aside even where no actual bias has been alleged or shown. 393 U.S. at 147-48.

In *Commonwealth Coatings* a subcontractor arbitrated a dispute with the sureties for the general contractor. The third and supposedly neutral member of the panel had over a period of several years participated in sporadic business dealings with the general contractor, for which the arbitrator had received fees of approximately $12,000. This relationship was not disclosed to the subcontractor by either the general contractor or the arbitrator until the award had been made.

The Court reversed and vacated the award, holding that the "elementary requirements of impartiality taken for granted in every judicial proceeding" apply with even greater force to arbitrations:

> "It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias."

393 U.S. at 148-49 (emphasis added).[4] The court ruled that the failure to disclose compelled vacation of the award on grounds both of fraud and corruption in the procurement, 9 U.S.C. §10(a); and of partiality on the part of the arbitrators, 9 U.S.C. §10(b).

The result in *Commonwealth Coatings* turns on the proposition that a party need not establish that a relationship actually resulted in partiality or bias on the part of an arbitrator. [*Compare* the slip opinion in this case at 15, where the Court of Appeals seems to require a showing of actual or at least probable bias.] Such a requirement would plunge the reviewing court into a difficult and imprecise analysis of the motives and thought processes of the arbitrator. The language from *Commonwealth Coatings* sweeps much more broadly, advocating "the simple and objective requirement that arbitrators disclose to the parties *any* dealings that *might* create *an impression* of *possible* bias." 393 U.S. at 148-49 (emphasis added). Indeed, it is instructive that the Court in *Commonwealth Coatings* found nothing in the record to suggest any improper motive, *other than* the undisclosed relationship; there was no evidence or implication that the relationship actually affected the arbitrator's ruling or deliberations. Instead, it was solely his failure to disclose a known re-

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4. Other courts have concurred that arbitrators are subject to a more stringent disclosure standard than are judges. In *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 441 F.2d 631 (5th Cir. 1971), the Court of Appeals considered a petition to set aside a patent suit judgment on grounds that the judge had a substantial interest in the case and an improper connection with the defendant. The court refused to apply to a judge the rigorous, "immaculate and sterile" criteria which must govern an arbitrator. The court justified the distinction in part on the basis that a judge's decision-making is continuous, while an arbitrator's service is only occasional and episodic; an arbitrator may therefore choose to hear only those cases where he is certain he has no connection whatsoever with the parties and witnesses. 441 F.2d at 635.

lationship which allowed an unacceptable inference of partiality. 393 U.S. at 147.

The facts of this case are, if anything, more compelling than those which produced *Commonwealth Coatings*, particularly given the arbitrator's continuing concealment of his relationships with Yeargin's witness. There is no dispute in the record that the arbitrator realized and remembered the past association with Waldron (he told another arbitrator) [Tr. 578; Poppleton at 54]; that Waldron was one of and perhaps the most crucial witness for Yeargin, with his work and testimony being the only evidence offered on the issue of delay damages (the panel in fact decided that P&W had failed properly to coordinate and schedule the job) [Tr. 414, 610; R. 79]; and that the arbitrator never disclosed the past associations to the parties, continuing to conceal his employment of Waldron even long after the hearing when questioned about it on deposition. [Tr. 578-79; Morton at 41.]

These facts impelled the district court to make an express finding that the arbitrator should have disclosed the relationships with Waldron. [Tr. 580.] The fact that the arbitrator retained Waldron to teach a seminar on scheduling certainly suggests a high regard for Waldron's expertise and a predisposition to accept his opinions as valid and persuasive, particularly when those opinions were offered at arbitration on the same subject Waldron had been hired to teach. Given this finding that disclosure should have been made, the inquiry of both the district and the appellate courts should have ended with reversal of the award: *Commonwealth Coatings* teaches that nondisclosure of even an innocent relationship may create an appearance of partiality which should be avoided in a factfinder who has "free rein to decide the law as well as

the facts" and is virtually exempt from appellate review. *See Commonwealth Coatings*, 393 U.S. at 148-49.

The confusion reflected in the opinion below is not unique. Notwithstanding the strict principles enunciated in the plurality opinion of *Commonwealth Coatings*, the federal courts have continued to reach conflicting results on the issue of bias of an arbitrator.[5] Recently, for example, the Court of Appeals for the Second Circuit rejected the proposal that an "appearance of bias" test should be applied to measure the fundamental fairness of an arbitration proceeding. In *International Produce, Inc. v. Rosshavet*, 638 F.2d 548 (2d Cir.), *cert. denied*, 451 U.S. 1017 (1981), the Court held that a neutral arbitrator's participation as a non-party witness in a previous maritime arbitration involving the same law firms required neither disqualification of the arbitrator or invalidation of the award. The Court went even further to rule that a strictly-applied standard of *"evident"* and actual partiality would control in that circuit:

> "We agree, therefore, with the appellant, that the Supreme Court in *Commonwealth Coatings* did not expand the §10 standard of 'evident partiality' to include 'appearance of bias.'"

638 F.2d at 551.[6]

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5. This diversity is perhaps explainable in part by the number of opinions written in *Commonwealth Coatings*. Mr. Justice Black wrote the plurality opinion; Mr. Justice White, with whom Mr. Justice Marshall joined, wrote a concurring opinion; and Mr. Justice Fortas, joined by Mr. Justice Harlan and Mr. Justice Stewart, dissented, stating that a showing of actual bias should be required under Section 10.

6. In any event *International Produce* is not controlling on the facts in this case, since there the arbitrator disclosed the challenged relationship. In contrast, P&W here was deprived of even an opportunity to object until long after the award had been made.

In contrast, other courts have viewed *Commonwealth Coatings* as creating a *per se* rule. In short, the reviewing court need not enter the subjective thicket of whether the relationship was of a type which would have an actual, prejudicial effect on the arbitrator's deliberations; the inquiry is much simpler, being only "Did the arbitrator fail to disclose something he should have disclosed?" *See, e.g., Rogers v. Schering Corp.*, 165 F. Supp. 295, 301 (D.N.J.), *motion to dismiss app. denied*, 262 F.2d 180 (3d Cir. 1958), *aff'd per curiam*, 271 F.2d 266 (3d Cir.), *cert. denied sub nom. Hexagon Laboratories, Inc. v. Rogers*, 359 U.S. 991 (1959) (failure to disclose constituted a denial of "due arbitration process").

The result of these conflicting readings is a deep and potentially crippling confusion as to those guidelines which should be applied to measure an arbitrator's fairness.

An increasing number of judges, commentators and parties are heralding arbitration as a meaningful alternative to litigation with its long court dockets and its expensive and attenuated discovery procedures.[7] Thus, the controversy raised by this case reaches far beyond these particular litigants: the Federal Arbitration Act is due to be increasingly invoked as both the public and the judiciary seek means by which to alleviate the overcrowded conditions of the courts. Parties who elect to arbitrate already surrender important procedural and ap-

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7. For example, three pilot districts in the federal court system are experimenting with civil arbitration in a program under the auspices of the Department of Justice. D. Maloof, "Compulsory Nonbinding Arbitration: Painless Arbitration," 1980 *Insurance Counsel Journal* 262. The Eastern District of Pennsylvania, the Northern District of California, and the District of Connecticut have adopted procedures whereby the courts refer to arbitration certain civil cases in which the United States is a party. [Local Civil Rule 8 of the Eastern District of Pennsylvania is set forth in the Appendix.]

pellate rights in exchange for a more efficient and speedy disposition of their claims. If litigants must also surrender their right to a fact-finder who is free from any suspicion of partiality - indeed if, as now, they do not even know what standard will govern the analysis of the fairness of their hearing - the future of arbitration as an alternative is short-lived.

WHEREFORE, petitioners move this Court to grant a writ of certiorari to review the decision of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

GRIFFIN B. BELL
FRANK C. JONES
(Counsel of Record)
KING & SPALDING
2500 Trust Company Tower
Atlanta, Georgia 30303

JAMES E. CLARK
THOMAS R. ELLIOTT, JR.
LONDON, YANCEY, CLARK & ALLEN
2100 First National Southern Natural Building
Birmingham, Alabama 35203
Attorneys for Petitioners

Of Counsel:

ROBERT BRAUNSCHWEIG
WACHTELL, MANHEIM & GROUP
30 Rockefeller Plaza
New York, New York 10020

APPENDIX

THE OPINION BELOW

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-7909

PARSONS & WHITTEMORE ALABAMA MACHINERY AND SERVICES CORPORATION and PARSONS & WHITTEMORE, INC.,
Plaintiffs-Appellants,

versus

YEARGIN CONSTRUCTION COMPANY, INC.,
Defendant-Appellee.

• • • • •

YEARGIN CONSTRUCTION COMPANY, INC.,
Plaintiff-Appellee,

versus

PARSONS & WHITTEMORE ALABAMA MACHINERY AND SERVICES CORPORATION and PARSONS & WHITTEMORE, INC.,
Defendants-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

(August 5, 1982)

Before TUTTLE, HENDERSON and CLARK, Circuit Judges.

CLARK, Circuit Judge:

Appellant Parsons & Whittemore Alabama Machinery and Services Corporation (P&W) sought in the district court the vacation of an arbitration award for $5,300,000 in favor of appellee Yeargin Construction Co. (Yeargin). The district court denied appellant's request and confirmed the award. P&W asserts it was denied a fair hearing before the arbitrators in violation of due process and 9 U.S.C. § 10. We affirm.

Facts

In May 1975, P&W sought bids from contractors for construction of a $280,000,000 pulp mill on the Alabama River near Monroeville, Alabama. P&W, acting as its own prime contractor, contracted directly for various types of work to be performed. Negotiations between P&W and potential contractors extended for over a year, during which time changes were made in the scope of the work. The mill was to be built on what is known in the construction trade as the "fast track" method (i.e., the drawings for the project were not complete at the time construction commenced but were to be developed during construction a step ahead of the actual work). In the absence of complete drawings for the project, contractors, including Yeargin, were provided with conceptual drawings or "flow sheets" to assist them in computing their bids.

Yeargin and P&W signed a contract for the mechanical work in December 1976, and Yeargin began its work in 1977. The contract called for an estimated cost of $2 million and contained provisions that provided for dispute resolution by arbitration in lieu of litigation. P&W terminated Yeargin's contract in October 1978 (Yeargin had performed approximately 80%) and completed the mechanical work itself.

Within a week of termination, Yeargin sued P&W in the Middle District of Alabama and filed with the American Arbitration Association a demand for arbitration of its breach of contract claim. P&W also filed a request for arbitration of all issues, including a counterclaim for the costs of completion, and asked the district court to stay the litigation pending arbitration. The court declined to stay proceedings pending arbitration; its action was affirmed, *Yeargin Construction Co. v. Parsons & Whittemore Alabama Machinery and Services Corp.*, 609 F.2d 829 (5th Cir. 1980); and discovery was permitted pending the appointment of arbitrators. The parties nominated arbitrators who were appointed in May 1979. The arbitration panel, chiefly through its chairman, attorney Poppleton, conducted pretrial conferences, hearings, and supervised continued discovery. The panel conducted an arbitration hearing of nine days which produced a transcript of 2,756 pages of testimony, additional deposition testimony, and 179 exhibits. The arbitration panel also received prehearing, post-hearing and reply briefs from both parties and heard oral argument. On November 20, 1979, the panel entered an award in favor of Yeargin in the amount of $5,300,000 with interest to run from that date at the rate of 6% per annum.

On November 24, 1979, P&W filed in the Northern District of Alabama an application to vacate the award. Yeargin cross-applied for confirmation of the award. On November 27, 1979, Yeargin also filed in the Montgomery action an application for confirmation of the award and a motion for judgment on it. That district court transferred the Montgomery action to the Northern District of Alabama, where it was consolidated with P&W's action and assigned to Judge Pointer.

Judge Pointer permitted discovery of the three arbitrators and a representative of the Association, India Johnson. He then conducted a three-day hearing, considered four pretrial depositions with numerous documents introduced in connection with them (adding 1,000 pages to the ballooning record), the entire transcript of the proceedings before the arbitrators, and additional documents and other materials which he noted. At the conclusion of this hearing, Judge Pointer made oral findings and conclusions and on August 27, 1980 entered judgment in favor of Yeargin and against P&W, confirming the arbitral award. Thereafter, on September 29, 1980, after oral argument, Judge Pointer denied P&W's motion for a new trial.

Scope of Review: Below and Here

The scope of judicial review of arbitration awards is limited. *Boise Cascade v. United Steelworkers,* 588 F.2d 127, 128 (5th Cir. 1979). An arbitration panel may make an award "without explanation of their reasons and without a complete record of their proceedings. . . ." *Wilko v. Swan,* 346 U.S. 427, 436, 74 S.Ct. 182, 187 (1953). Review is limited to consideration of the statutory grounds for vacation unless the award is "without foundation in reason or fact." 588 F.2d at 129. Congress has provided four bases for vacation:

> (a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any

other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10.

P&W sought vacation relying, specifically and by implication, on three of the grounds provided by Congress: (a), (b), and (c) above. The district court denied that relief. We examine his conclusions to ensure that his factual findings are not clearly erroneous and his legal findings are correct with respect to these three grounds. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). Our review reveals that some of appellant's arguments fail because they are not based on the version of the facts found by the district court. We conclude that his findings are not clearly erroneous. The remaining arguments fail because appellant is unable to discredit the district court's legal conclusions.

I. *Failure of the Panel and Association to Follow Its Own Rules*

P&W argues that repeated violation of the Association rules and procedures operated to their prejudice and thus denied them a fair hearing and, implicitly, due process.

1. *Were Arbitrators Informed as to the Length of Time Necessary?*

Appellant notes that the Commercial Arbitration Manual provides:

Before contacting any arbitrator for the purpose of offering appointment in a given case, you *must* obtain

> information from the parties concerning their estimate as to the amount of time the arbitration will take. This is *vital* information which must be given to prospective arbitrators to assist them in deciding whether to accept the appointment. Even though it might make [it] easier at first in gaining acceptance of appointment not to mention anticipated hearing time, to do so would be unfair to the arbitrator who is contributing his or her time and abilities and could only damage the reputation of the Association.

Section 12.10, Commercial Manual (emphasis in original).

P&W asserts that "[t]hree persons who agreed to serve thus accepted the assignment with little or no knowledge of the complexity of the issues they would be asked to consider; of the sustantial monetary amounts at issue; or, most critically, of the expected length of the evidence." Appellant's Brief at 5. P&W indicates that the potential arbitrators were only told that the case was "large." The record reflects that the arbitrators were not told how long it would take to hear the case.

Nonetheless, the record does reflect that the potential arbitrators were told that this was a large multimillion dollar case and that "a large construction dispute needs a strong panel to keep arbitration from getting out of hand." Association representative Johnson testified that it is difficult to determine how long a hearing will take until close to the scheduled date.

Crucially, the trial judge found that the arbitrators would have been willing to spend more time on the case if that would have been necessary. This finding is clearly supported by the record. Mr. Poppleton testified that it would have made no difference to him if the hearing took 50 days. Mr. Morton was willing "to give

whatever . . . time" was requested. Arbitrator Barge is the only one who complained that his crowded schedule limited his availability. The parties nominated the arbitrators in the first instance. The nomination process requires that the parties balance negative and positive features of prospective arbitrators. Persons experienced in the area to be arbitrated are desirable as arbitrators but are likely to have extensive demands on their time. Our review of the record does not indicate that the busy lives of the arbitrators adversely impacted on the parties. As to this assertion of a rule violation, we find no factual support. Further, as will later be discussed, we concur with the district court that P&W had sufficient time in which to present its case under the guidelines promulgated by the arbitrators.

2. *Recusal Motion: Creating Evident Bias on the Part of the Panel?*

Displeased by several panel rulings in the summer of 1979, appellant moved to recuse or disqualify the panel. The motion was submitted in accordance with Association rules to the arbitration association. Appellant points out that arbitration rules require that the Association determine whether the arbitrator should be disqualified. Instead, the motion was referred to the arbitrators for decision.

The district judge held that the referral directly to the board members was appropriate under the circumstances. Canon 2 of the Code of Ethics for Commercial Arbitrators *permits* arbitrators to consider requests for their withdrawal. The bases for the motion were rulings by the arbitrators which caused P&W to believe they were prejudiced. The Association was uninformed with respect to the merits of these rulings. Because the motions

were submitted within two weeks of the scheduled hearing, referral to the panel was necessary in order to allow consideration of the motions before the scheduled hearing date.

The thrust of P&W's argument is that the panel members would be prejudiced by the knowledge that P&W had challenged their impartiality. We are urged "that among the situations in which the probability of bias in the decisionmaker is too high to be *constitutionally* tolerable are those in which the adjudicator has been the target of personal criticism from the party before him." Appellant's Brief at 19 (emphasis added). The appellant cites three decisions of the Supreme Court. In the first, *Taylor v. Hayes*, 418 U.S. 488, 501-03, 94 S.Ct. 2697, 2704-05 (1974), the Court found in a criminal trial the judge had become "embroiled in a running controversy with" the defendant's counsel, and there was a display of an unfavorable personal attitude toward petitioner, his ability, and his motives, sufficiently so that the issue of whether the attorney was in contempt of court should have been finally adjudicated by another judge. Nothing approaching this kind of situation is alleged here.

Similarly, in *Mayberry v. Pennsylvania*, 400 U.S. 455, 465, 91 S.Ct. 499, 505 (1971), the Court recognized that a judge may become so "personally embroiled" with a lawyer during the trial as to make the judge unfit to sit in judgment on a contempt charge. Such, again, is not the case here. The appellant does not point to any portions of the record that demonstrate any of the arbitrators being biased against it. Other than adverse rulings against it, P&W points to nothing. The alleged error must not be the grounds that the arbitrator's impartiality is challenged. Without demonstrable facts that evidence partiality, the arbitration must be upheld.

Finally, P&W relies on *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456 (1975) (*see* brief of the appellant at 19). In rejecting a claim that a combination of investigative and adjudicative functions creates an unconstitutional risk of bias, Justice White tells us there is "a presumption of honesty and integrity in those serving as adjudicators. . . ." *Id.* at 47, 95 S.Ct. at 1464. The Court has found state administrators "are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." *United States v. Morgan*, 313 U.S. 409, 421, 61 S.Ct. 999, 1004, 85 L.Ed. 1429 (1941). Nothing rebuts this presumption in this case. Appellant has totally failed to demonstrate evident partiality. P&W was not denied a fair hearing as the result of the panel not knowing in advance the amount of time needed for the proceeding and the panel knowing that P&W was seeking its disqualification. Nor does it appear that personal criticism was directed toward P&W or its counsel in a fashion that displayed partiality. Apparently, there was criticism of both parties, particularly by arbitrator Barge. These arguments must be rejected.

II. *Arbitrators' Failure to Postpone the Hearing*

An arbitration award may be set aside "[w]here the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown . . . ." 9 U.S.C. § 10(c). P&W asserts that the hearing should have been postponed because of counsel scheduling conflicts and to allow time for P&W to rebut the so-called Sirrine and Waldron Reports.

1. *Counsel Scheduling Conflicts*

As early as June 13, 1979, the arbitration hearing was tentatively set for September 24 (discovery and prepara-

tion for the hearing had commenced months before). The hearing was held on that date and lead counsel for P&W, Mr. Elliott, was unable to attend until 2:30 that afternoon. P&W was represented by three attorneys at the morning session on September 24. During that time, two Yeargin witnesses were presented. Their cross-examination was delayed until after Mr. Elliott's arrival. He was provided transcripts of their testimony and, the district court found, his cross-examination was adequate and effective. The witnesses had been thoroughly deposed by Mr. Elliott prior to trial. In a complex arbitration, it is difficult to bring the parties, their witnesses, the evidence, and the arbitrators together at once. The fact that attorney Elliott could not be present until 2:30 p.m. was not shown to affect in the slightest degree the outcome of the proceeding. Appellant's attorney was at worst inconvenienced under the circumstances. We cannot say that the failure to postpone the long scheduled hearing was "misconduct."

2. *The Failure of the Panel to Delay the Hearing to Allow P&W an Opportunity to Rebut the Reports of Yeargin's Experts*

The scope of work which Yeargin was to perform was a principal issue between the parties during the arbitration hearing. In order to support its claim that the scope had been broadened, Yeargin commissioned what became known as the Sirrine and Waldron Reports. The reports were voluminous and complex. P&W argues that there was insufficient time to prepare rebuttals to the reports. However, one month before the hearings, P&W was supplied with a 102-page synopsis of the report with 166 exhibits and 8 appendices, including the Sirrine Report. The district court found:

> Up until August 30th the only opposition by P and W to the proposed scheduled hearing on Septem-

> ber 24th was in terms of potential conflicts with other cases and litigation. Up until August 30th, 1979, there was no presentation by P & W of inability to prepare and to present its case at an arbitration proceeding that would commence September 24th, and this is so even though the Sirrine Report was not received until August 24th, and indeed P and W's counsel was on notice that it would not in all likelihood be received until August 24th, that knowledge having occurred really as a result of the July 23rd conference in which there was a setting off of the submission date and a denial of the request for interrogatory information.

Record at 602.

The district judge appropriately dealt with this contention:

> There are many ways of contradicting evidence presented by experts, no one of which certainly is appropriate in all circumstances.
>
> The Court has no difficulty with the position of P and W, that it would have preferred to have at least had a study, one or more made, concerning the Sirrine Report, or the Waldron Report, which was in sufficient detail in effect to have been parallel to it, and showing some glaring errors in logic, or mathematics, or the like, even on the same methodology.
>
> The time for that certainly was not available under the procedures as adopted by the panel. There was, however, time for a modified approach to that, whether in terms of some sampling of results, as well as a critique of basic methodology. And indeed, there was opportunity for the basic presentation of other expert opinions concerning the source of materials relied upon, the basic methodology and approach adopted by Sirrine or by Waldron.

Indeed, as I read through the transcript of the proceedings, there were more than one such witness presented by P and W to the panel whose testimony cast significant doubt on the validity and weight of both of those reports.

It may well have been, and one must surmise from the result of the arbitration proceeding, that such evidence did not sufficiently impress the arbirtators to the point of rejecting the Sirrine Report.

The Waldron Report, it appeared to me, was—close to the words used in the brief filed by P and W—essentially destroyed by his own testimony and by other evidence in the case. It is, of course, not for this Court to decide or to re-decide the merits of the controversy, nor in this am I saying that there could not have been prejudice to P and W in terms of the ultimate result of the arbitration proceedings by not having had the type of report it would like to have had.

It certainly would have had time, however, to have presented someone else's study in written form, such as might duly impress the two engineering types on the arbitration panel, showing in comparison with the Sirrine Report, although not patterned after it and although adopting the approach of other engineering firms, what changes in scope of work were deemed to have occurred and what the economic impact of that was, and likewise in connection with the Waldron Report the effect of scheduling problems and the like.

P&W made the tactical trial decision not to procure its own reports and instead elected to rely on its ability to attack the reports being prepared by Yeargin. P&W was aware that the scope of the work was a crucial issue

during the hearings and had ample time to prepare material to contradict the anticipated report. We agree with the trial judge while P&W attacked the reports through cross-examination and expert witnesses, the panel apparently chose to rely on those reports. We add that the hearing could have been delayed indefinitely by the granting of a series of requests for delay to study opposition reports and prepare counterreports. P&W chose its form of attack and cannot now be granted a second opportunity because it lost. Under the circumstances, the refusal to grant a delay was not misconduct. This is not a basis to set aside the award.

III. *Relationship of Abritrator Morton With Yeargin and Witness Waldron*

Again, P&W relies on the evident partiality provision of 9 U.S.C. § 10(b) to set aside the award. Our review of this issue will require careful consideration of factual findings and interpretation of a Supreme Court plurality opinion.

1. *Arbitrator's Relationship With James Waldron*

James Waldron, an expert on construction scheduling, testified for Yeargin at the arbitration hearing. Arbitrator Morton attended a two-day seminar at which Waldron lectured ten to fifteen years prior to the hearing. Some five years before the hearing, Morton arranged for some employees to attend a seminar conducted specially for them by Waldron. Although Morton mentioned this relationship with Waldron to a fellow arbitrator, it was not revealed to the parties. Morton was a nominee of P&W, which now challenges his impartiality.

P&W asserts that this failure to disclose violates the "per se" rule of *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S.Ct. 337 (1968).

> The petitioner, Commonwealth Coatings Corporation, a subcontractor, sued the sureties on the prime contractor's bond to recover money alleged to be due for a painting job. The contract for painting contained an agreement to arbitrate such controversies. Pursuant to this agreement petitioner appointed one arbitrator, the prime contractor appointed a second, and these two together selected the third arbitrator. This third arbitrator, the supposedly neutral member of the panel, conducted a large business in Puerto Rico, in which he served as an engineering consultant for various people in connection with building construction projects. One of his regular customers in this business was the prime contractor that petitioner sued in this case. This relationship with the prime contractor was in a sense sporadic in that the arbitrator's services were used only from time to time at irregular intervals, and there had been no dealings between them for about a year immediately preceding the arbitration. Nevertheless, the prime contractor's patronage was repeated and significant, involving fees of about $12,000 over a period of four or five years, and the relationship even went so far as to include the rendering of services on the very projects involved in this lawsuit. An arbitration was held, but the facts concerning the close business connections between the third arbitrator and the prime contractor were unknown to petitioner and were never revealed to it by this arbitrator, by the prime contractor, or by anyone else until after an award had been made.

393 U.S. 145, 146, 89 S.Ct. 337, 338 (1968).

The Court acknowledged that the third arbitrator was guilty of neither fraud nor actual bias. However, the plurality analogized from cases involving judges, *see, e.g.*,

Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927). Awards should be set aside when there is "the slightest pecuniary interest."

> It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.

393 U.S. 145, 148-49, 89 S.Ct. 337, 339 (1968).

Thus, the plurality focused upon the appearance of bias as sufficient to reverse an award. The concurring opinion, necessary for a majority, made clear that the standards applicable to Article III judges were not being adopted as governing arbitrators. The concurring opinion limited the broader language used by the plurality to the facts of the case.

> The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function. This does not mean the judiciary must overlook outright chicanery in giving effect to their awards; that would be an abdication of our responsibility. But it does mean that arbitrators are not automatically disqualified by a business re-

> lationship with the parties before them if both parties are informed of the relationship in advance, *or if they are unaware of the facts but the relationship is trivial.* I see no reason automatically to disqualify the best informed and most capable potential arbitrators.

393 U.S. 145, 150, 89 S.Ct. 337, 340 (1968) (citation omitted; emphasis supplied) (White, J., concurring).

Commonwealth is distinguishable. The "appearance of bias" that governs disqualifications of judges must be based on facts that would lead a reasonable man to believe that bias is present. Here 9 U.S.C. § 10(b) requires "evident partiality or corruption in the arbitrators, or either of them." The relationship must indicate either personal, financial, or associational ties that would affect the impartiality of the arbitrator. Obviously, not every relationship results in partiality or bias. The district court found that the prior relationship between Waldron and Morton was insufficient to vitiate the arbitration award.

2. *Morton's Association with Yeargin*

Harrison International Corporation was a subcontractor on a portion of a hospital construction job in North Carolina. Robbins Corporation, of which Morton was vice president, was general contractor on the job. Harrison, without participation by Robbins, subcontracted a small portion of its work to Yeargin in October, with work beginning in November. Robbins became aware of the relationship in mid-November. The district judge held it was not clear whether Morton knew of this before the arbitration award was rendered, November 20, 1979. Our review of Morton's testimony reveals strong support for the conclusion that he was unaware of the relationship.

Q. Prior to the time that arbitration was decided, in your opinion, would you have known that Yeargin was a subcontractor on the [Harrison] job?

A. No. In my opinion, I would not have known that.

Q. You're not saying maybe that Robbins didn't know, but you're saying—

A. Right.

Q. —that you personally didn't know?

A. Yes.

The unlikelihood that Morton knew of the relationship coupled with the indirectness of the relationship (Morton's employer's subcontractor on a job employs Yeargin to do some of the work) causes us to conclude that appellant failed to establish "evident partiality."

Combined Effect

Finally P&W argues that the cumulative effect of the actions by the arbitrators require setting the award aside. The arbitrators faced a complex factual dispute involving substantial money. The parties hotly contested the case. Because of the potential award, the parties prepared massive evidence for consideration by the arbitrators. It was clear from the beginning that a tight rein was necessary to keep the proceedings from getting out of hand. The panel was strict, often abrupt, with the parties. The proceedings were pushed along; evidence was trimmed and testimony condensed. Such streamlining of procedures notwithstanding, extensive pretrial conferences were held and a nine-day hearing was conducted yielding 2,756 pages of testimony with additional depositions and 179 exhibits.

On this evidence and with this background, an award was made. We have carefully examined the record and conclude the award was fairly reached without the appearance of bias.

The increasing complexity and cost of litigation has fostered an increase in the use of arbitration. For that tool of dispute resolution to remain viable, proceedings must be kept streamlined enough to ensure participation by capable arbitrators. The decision to arbitrate is a compromise by the parties.

We AFFIRM.

APPLICABLE STATUTES

A. 9 U.S.C. §9: Award of arbitrators; confirmation; jurisdiction; procedure.

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

B. 9 U.S.C. §10: Same; vacation; grounds; rehearing.

In either of the following cases the United States court in and for the district wherein the award was made may

make an order vacating the award upon the application of any party to the arbitration -

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

LOCAL RULE 8 OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(Rev. 8/1/80)

LOCAL CIVIL RULE 8 - ARBITRATION

Sec. 1. *Certification of Arbitrators.*

A. The Chief Judge shall certify as many arbitrators as he determines to be necessary under this rule.

B. An individual may be certified to serve as arbitrator if: (1) he has been for at least five years a member of the bar of the highest court of a state or the District of Columbia, (2) he is admitted to practice before this court, and (3) he is determined by the Chief Judge to be competent to perform the duties of an arbitrator.

C. Each individual certified as an arbitrator shall take the oath or affirmation prescribed by Title 28, U.S.C.. §453 before serving as an arbitrator.

D. A list of all persons certified as arbitrators shall be maintained in the office of the Clerk.

Sec. 2. *Compensation and Expenses of Arbitrators.*

The arbitrators shall be compensated $75.00 for services in each case assigned for arbitration. In the event that the arbitration hearing is protracted, the court will entertain a petition for additional compensation. Whenever the parties agree to have the arbitration conducted before a single arbitrator, the single arbitrator shall be compensated $75.00 for services. The fees shall be paid by or pursuant to the order of the Director of the Administrative Office of the United States Courts.

Arbitrators shall not be reimbursed for actual expenses incurred by them in the performance of their duties under this rule.

Sec. 3. *Jurisdiction and Powers of Arbitrators.*

The court shall refer to arbitration any civil action in which the complaint was filed after February 1, 1978, provided:

1. The United States is a party, and:

(A) the action is a type that the Attorney General has provided by regulation shall be submitted to arbitration; or

(B) the action is brought pursuant to Section 2 of the Act of August 24, 1935, as amended (Title 40, U.S.C. §270(b)), the United States has no monetary interest in the claim, and the relief sought:

(i) consists only of monetary damages not in excess of $50,000, exclusive of interest and costs; or

(ii) consists in part of money damages not in excess of $50,000, exclusive of interest and costs, and the court determines in its discretion that any non-monetary claims are insubstantial; or

2. the United States is not a party, and:

(A) the parties consent to arbitration, the relief sought consists only of money damages, and the parties agree to pay a reasonable fee to the arbitrators; or

(B) (i) the relief sought:

(a) consists only of money damages not in excess of $50,000, exclusive of interest and costs; or

(b) consists in part of money damages not in excess of $50,000, exclusive of interest and costs, and the court determines in its discretion that any non-monetary claims are insubstantial; and

(ii) jurisdiction is based in whole or in part on:

(a) Title 28, U.S.C. §1331 and the action is brought pursuant to Section 20 of the Act of March 4, 1915, as amended (Title 46, U.S.C. §688);

(b) Title 28, U.S.C. §§1331 or 1332 and the action is based on a negotiable instrument or a contract; or

(c) Title 28, U.S.C. §§1332 or 1333 and the action is for personal injury or property damage.

Sec. 4. *Referral to Arbitration.*

(a)(1) Actions subject to arbitration pursuant to this rule shall be referred to arbitration by an order of the judge to whom the case is assigned after a 20 day period from the filing of the answer. The court's order shall set forth the date, time and place of the arbitration hearing and shall designate the arbitrators. In the event that a third party is brought in to the action, this 20 day period shall commence to run from the date of the filing of an answer by the third party. In the event that a party has commenced discovery within the 20 day period, and the court is so notified, the case shall not be referred to arbitration until discovery has been completed or upon expiration of 120 days from the filing of the answer, whichever occurs earlier. In the event that a party has filed a motion for judgment on the pleadings, summary judgment or similar relief, the case shall not be referred to arbitration until the court has ruled on the motion, but the filing

of such a motion after referral shall not stay the arbitration unless the judge so orders.

(2) For the sole purpose of making the determination as to whether the damages are in excess of $50,000, exclusive of interest and costs, as provided in Sections 3(1)(B)(i), 3(1)(B)(ii), 3(2)(B)(i)(a) and 3(2)(B)(i)(b), damages shall be presumed in all cases to be less than $50,000, exclusive of interest and costs, unless counsel of record for the plaintiff at the time of filing the complaint or counsel of record for defendant at the time of filing an answer containing a counterclaim, files with the court a document signed by said counsel which certifies to the best of his knowledge and belief that the damages recoverable exceed the sum of $50,000, exclusive of interest and costs. The court may disregard such certification and require arbitration if satisfied that recoverable damages do not exceed $50,000.

(b) The arbitration shall be conducted before a panel of three arbitrators, one of whom shall be designated as chairman of the panel, unless the parties agree to have it conducted by a single arbitrator. The parties may by agreement select any person or persons to conduct the arbitration. If, within seven days after the action has been referred to arbitration, the parties have not notified the Clerk of the Court that they have made such a selection, the arbitrator or arbitrators shall be chosen by the Clerk by a process of random selection from among the persons certified as arbitrators by the court.

(c) A person selected to be an arbitrator shall be disqualified for bias or prejudice as provided in Title 28, U.S.C. §144 and shall disqualify himself in any action in which he would be required under Title 28, U.S.C. §455 to disqualify himself if he were a justice, judge, magistrate or referee in bankruptcy.

Sec. 5. *Arbitration Hearing.*

(a) The deputy clerk for arbitration shall telephone the arbitrators and the attorneys for the parties in an effort to ascertain an agreeable time and date for the arbitration hearing and he shall recommend such time and date to the judge for inclusion in the order.

(b) The arbitration hearing shall take place in accordance with the date, time and place set forth in the order of the court. The arbitrators are, however, authorized to change the date and time of the arbitration hearing provided the hearing is commenced within 30 days of the hearing date set forth in the order. Continuances beyond this 30 day period must be approved by the judge to whom the case has been assigned. The arbitration hearing shall be concluded promptly.

(c) The deputy clerk for arbitration shall give notice of the hearing to all parties at least 25 days prior to the date set for the hearing.

(d) The arbitration may proceed in the absence of any party who, after due notice, fails to be present, but an award of damages shall not be based solely upon the absence of a party.

(e) Rule 45 of the Federal Rules of Civil Procedure shall apply to subpoenas for attendance of witnesses and the production of documentary evidence at an arbitration hearing under this chapter. Testimony at an arbitration hearing shall be under oath or affirmation.

(f) The Federal Rules of Evidence shall be used as guides to admissibility of evidence. Copies or photographs of all exhibits, except exhibits intended solely for impeachment, must be marked for identification and delivered to adverse parties at least ten days prior to the hearing and

the arbitrators shall receive such exhibits into evidence without formal proof unless counsel has been notified at least five days prior to the hearing that the adverse party intends to raise an issue concerning the authenticity of the exhibit. The arbitrators may refuse to receive into evidence any exhibit, a copy or photograph of which has not been delivered to the adverse party, as provided herein.

(g) A party may have a recording and transcript made of the arbitration hearing at his expense.

Sec. 6. *Arbitration Award and Judgment*

The arbitration award shall be filed with the court promptly after the hearing is concluded and shall be entered as the judgment of the court after the time for requesting a trial *de novo* pursuant to Section 7 has expired, unless a party demands a trial *de novo* before the court pursuant to that section. The judgment so entered shall be subject to the same provisions of law, and shall have the same force and effect as a judgment of the court in a civil action, except that it shall not be the subject of appeal.

Sec. 7. *Trial De Novo*

(a) Within twenty days after the filing of the arbitration award with the court, any party may demand a trial *de novo* in the district court. Written notification of such a demand shall be served by the moving party upon all counsel of record or other parties.

(b) Upon a demand for a trial *de novo*, the action shall be placed on the calendar of the court and treated for all purposes as if it had not been referred to arbitration, and any right of trial by jury that a party would otherwise have shall be preserved inviolate.

(c) At the trial *de novo* the court shall not admit evidence that there had been an arbitration proceeding, the nature or amount of the award, or any other matter concerning the conduct of the arbitration proceeding, except that testimony given at an arbitration hearing may be used for impeachment at a trial *de novo*.

(d) If the party who demanded a trial *de novo* fails to obtain a judgment in the district court, exclusive of interest and costs, more favorable to him than the arbitration award, he shall be assessed the amount of the arbitration fees.

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing PETITION FOR WRIT OF CERTIORARI upon counsel for all parties, by depositing a copy of same in the United States Mail, postage prepaid, addressed as follows:

Mr. Roland Nachman, Jr.
Suite 809
First Alabama Bank Building
Montgomery, Alabama 36101

Mr. O. G. Calhoun
Haynsworth, Perry, Bryant,
Marion & Johnstone
Suite 409, East North Street
Greenville, South Carolina 29602
This 22nd day of November, 1982.

FRANK C. JONES

Office-Supreme Court, U.S.
FILED
DEC 15 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-941

In the Supreme Court of the United States

October Term, 1982

PARSONS & WHITTEMORE ALABAMA MACHINERY AND SERVICE CORPORATION and PARSONS & WHITTEMORE, INC.,
Petitioners,

vs.

YEARGIN CONSTRUCTION COMPANY,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

GRIFFIN B. BELL
FRANK C. JONES
(Counsel of Record)
KING & SPALDING
2500 Trust Company Tower
Atlanta, Georgia 30303

JAMES E. CLARK
THOMAS R. ELLIOTT, JR.
LONDON, YANCEY, CLARK & ALLEN
2100 First National Southern
Natural Building
Birmingham, Alabama 35203
Attorneys for Petitioners

Of Counsel:
ROBERT BRAUNSCHWEIG
WACHTELL, MANHEIM & GROUF
30 Rockefeller Plaza
New York, New York 10020

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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STATEMENT OF RELATED COMPANIES PURSUANT TO RULE 28.1

Parsons & Whittemore Enterprises Corp. is the parent corporation of Parsons & Whittemore, Inc., one of the Petitioners in this action. The other Petitioner, Parsons & Whittemore Limited; Parsons & Whittemore Lyddon Ltd.; is a wholly-owned subsidiary of Parsons & Whittemore, Inc.

Subsidiaries of Parsons & Whittemore, Inc. which are not wholly-owned are The Black Clawson Company; Parsons & Whittemore (France) S.A.[1] and Parsons & Whittemore Bruxelles, S.A.

The affiliates of Parsons & Whittemore, Inc. are Parsons & Whittemore Construction Company, Inc.; Parsons & Whittemore Limited; Parsons & Whittemore Lyddon Ltd.; Parsons & Whittemore Maquinas Industrials, S.A.; The Downingtown Manufacturing Company; Flat Rock House Corp.; Hehner & Cox Limited; Lyddon et Cie; Lyddon & Company (Pulp) Ltd.; Lyddons Pulp Limited; Pulp and Paper Research Company Ltd.; Gateway Development Corp.; The Saudi Arabia Concrete Products Limited; and Gulfstream Chemicals, Inc.

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1. Subsidiaries of Parsons & Whittemore (France) S.A. are Papeteries de Madagascar, S.A., and Societe Immobiliere Mermoz Ponthieu SARL.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING THE PETITION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-7909

PARSONS & WHITTEMORE ALABAMA MACHINERY AND SERVICES CORP. and PARSONS & WHITTEMORE, INC.,
Plaintiffs-Appellants,

versus

YEARGIN CONSTRUCTION CO., INC.,
Defendant-Appellee.

YEARGIN CONSTRUCTION CO., INC.,
Plaintiff-Appellee,

versus

PARSONS & WHITTEMORE ALABAMA MACHINERY AND SERVICES CORP., and PARSONS & WHITTEMORE, INC.,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

ON PETITION FOR REHEARING

(October 21, 1982)

Before TUTTLE, HENDERSON and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Thomas A. Clark

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AFFIRMING THE DECISION OF THE DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-7909

D.C. Docket No. CV-79-P-1322-S & CV-79-P-1447-S

PARSONS & WHITTEMORE ALABAMA MACHINERY AND SERVICES CORP. and PARSONS & WHITTEMORE, INC.,
Plaintiffs-Appellants,

versus

YEARGIN CONSTRUCTION COMPANY, INC.,
Defendant-Appellee.

YEARGIN CONSTRUCTION COMPANY, INC.,
Plaintiff-Appellee,

versus

PARSONS & WHITTEMORE ALABAMA MACHINERY AND SERVICES CORP., and PARSONS & WHITTEMORE, INC.,
Defendants-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

Before TUTTLE, HENDERSON and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that appellants pay to appellee, the costs on appeal to be taxed by the Clerk of this Court.

August 5, 1982

ISSUED AS MANDATE:

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

CIVIL ACTION NO. 79-P-1322-S

PARSONS AND WHITTEMORE ALABAMA MACHINERY AND SERVICES CORPORATION, and PARSONS AND WHITTEMORE, INC.,
Plaintiffs,

vs.

YEARGIN CONSTRUCTION COMPANY, INC.,
Defendant.

CAPTION

THE ABOVE-ENTITLED CAUSE came on to be heard before the Honorable Sam C. Pointer, Jr., United States District Judge, in Courtroom Number 2 of the United States District Courthouse, Birmingham, Alabama, on the 22nd day of August, 1980, commencing at 9:00 A.M., at which time the following proceedings, among others, were had and done:

FINDINGS OF FACT - CONCLUSIONS OF LAW

THE COURT: The Court will now enter findings of fact and conclusions of law, dictating the same into the

record, and reserving merely the right to make corrections as to grammar to these findings and conclusions in the event of appeal.

These findings are based upon the evidence that has been presented in this cause, consisting of the testimony of various witnesses, depositions filed with the Court, and a number of documents, the most substantial of which in terms of the volume is a transcript of the arbitration proceedings themselves held over a nine day period in 1979.

The Court has considered the evidence presented, including these various documents, has read the same, consisting of something in excess, I think, of thirty-three hundred pages, in addition to, of course, considering the testimony given in open court.

The issues are as drawn by the pleadings in this case, as supplemented and refined by certain orders that occurred prior to this trial, and indeed by certain comments or statements during the course of trial, describing the issue for decision.

I have also read and studied the briefs of both sides, directing my attention to authorities of law pertinent to this litigation.

It is first appropriate that I describe in brief fashion some of the background for this present litigation.

In December, 1976, a contract was entered into between Yeargin Construction Company and Parsons and Whittemore. Parsons and Whittemore was the owner, and to be general contractor for a construction project of approximately two and one-quarter hundred million dollars —I'm using the figures relating to the construction itself, exclusive of financing costs—of a pulp mill in South Alabama.

The contract referred to provided that mechanical installation work for the project would be performed by Yeargin.

Yeargin began construction, or performance under this subcontract in the following year, 1977, there being some dispute between the parties as to whether the commencement date should be taken as the spring of that year or the fall of that year.

After Yeargin had performed something in the range of eighty to eighty-five percent of the mechanical installation work, they were, on October 6th, 1978, dismissed from the job site by Parsons and Whittemore, which at times I may refer to as P and W.

On October 20th, 1978, Yeargin filed an action in the Federal District Court in Montgomery seeking, among other things, damages premised upon several theories, and a return of equipment that remained on the job site.

By hearings conducted in that Court certain resolution of immediate problems was achieved, apparently by agreement, and indeed both parties were of an accord to the effect that at least certain issues between the parties were due to be arbitrated.

Whether that arbitration was to be conducted under commercial rules or construction rules was perhaps in dispute.

But, in any event, there was an agreement reached concerning the arbitrability of at least certain of the claims between the parties.

Questions arose in the handling of that litigation whether it should be stayed fully pending arbitration, and as to whether discovery should be stayed or not, pending arbitration.

There were appellate proceedings directed to the Fifth Circuit relating to the trial court's rulings in those matters.

In any event, in May, 1979, three arbitrators were selected by the parties. Following certain prehearing conferences, which will be covered in greater detail later in these findings, an actual hearing of the arbitration began in Birmingham on September 24th, 1979.

Hearings were conducted for the five days of that week, and for the four days of the following week, at which time, on October 4th, 1979, evidence in the case was technically concluded.

I say technically concluded because it is not altogether clear whether some matters might be subject to supplementation in briefs, and indeed it appears that there was some supplementation at least in one regard by P and W in its post hearing brief.

Oral argument was heard by the arbitration panel in November, in conjunction with post hearing briefs that had been filed, and a decision was rendered by the arbitration panel on November 20th, 1979.

In dispute between the parties as it was ultimately presented to the arbitrators was some fourteen million dollars.

Yeargin, in essence, claimed some eight million dollars in which it was asserting primarily that there were changes in the scope of work from that which it was obligated to perform, and upon which it had bid, and that which it was ultimately called upon to perform, and that there were extra charges, or breaches of contract which caused it damage in the way of extra overtime expenses, extra charges from inefficiency of coordination and the like.

P and W in addition to denying generally those charges asserted that it had just cause to remove Yeargin from the job in October, 1979, by reason of Yeargin's falling behind in work under the contract, and at least partly due to the claim that Yeargin's performance under the contract was inadequate.

It sought primarily damages in the form of the additional costs required to complete the mechanical installation portion of the project.

The award of the arbitrators went in favor of Yeargin, awarding Yeargin five million three hundred thousand dollars, plus interest, as I recall, and outlining in summary fashion the ultimate factual conclusions made by the panel.

Immediately upon receiving that award P and W instituted an action in this Court seeking to set the same aside, and alleging as grounds therefor many of the grounds outlined in Title 10 of the United States Code with respect to such awards.

Yeargin countered in that litigation by various motions, including ultimately a request in that case that the award be confirmed.

At the same time, the cause in the Middle District Court of Alabama was transferred to this Court by virtue of forum requirements under the Arbitration Law, there being a motion in that case by Yeargin to confirm the award.

The two cases ultimately found their way to me for hearing. I consolidated the two, and certain pretrial proceedings were held in the consolidated cases.

Discovery limited however in scope was permitted to P and W from the three arbitrators, as well as from a representative of the American Arbitration Association.

Other discovery was also conducted by the parties in this post arbitration Federal Court proceeding.

The matter then came on for trial last Friday, and after testimony and presentation of evidence on that Friday, yesterday and today, the cause has been submitted to the Court for a decision.

One of the grounds specified by P and W as the basis for setting aside the arbitration award relates to the situation of Barry Morton, one of the three arbitrators. Namely, it is asserted that Morton was an acquaintance of James Waldron, one of the principal witnesses on behalf of Yeargin in the arbitration proceeding, and that Morton failed to disclose that fact to the parties at any time prior to the award, and that indeed implicitly it, P and W, was unaware of that relationship.

I don't think there is any direct evidence actually that P and W was unaware of that relationship.

I, however, take that to be implicit in the case.

Additionally, evidence has been presented that Morton's firm, Robbins Engineering Company, in the fall of 1979 had a relationship with Yeargin in that Yeargin became a subcontractor on a job in North Carolina, on which Robbins was general contractor, and that this, too, was not disclosed to the parties, and implicitly that P and W had no knowledge of that fact.

It is, of course, a principle of law reasonably well established over time, and certainly established in importance by reason of the Supreme Court Decision in *Commonwealth Coatings* that relationships between an arbitrator and those involved in the arbitration may constitute a basis for setting aside the award by the arbitration panel, where those facts are not disclosed in such a manner

as to afford the parties an opportunity to at least consider whether they object to participation by that arbitrator.

In this regard, it may be noted that the same Mr. Morton did disclose in early June, 1979, that he had been a fraternity brother of the lead counsel for P and W, and that although warned or advised of this situation, Yeargin did not choose to press any claim of disqualification on the part of Morton.

Certainly the theme and expectation is that there shall be and should be disclosure by arbitrators of their relationships with the parties, counsel, and witnesses, so as to provide an opportunity by the parties to the arbitration to object, if that be their desire, to further participation.

The association between Morton and Waldron is, as shown by the evidence to be this, that some ten to fifteen years ago Morton attended a seminar at which Waldron was the instructor. This fact, or, at least, some acquaintanceship was disclosed by Morton to a fellow arbitrator, Mr. Poppleton, at some time during the summer of 1979, although not, as noted, disclosed to the parties to the arbitration. It should have been.

The question in part, then, becomes what is the consequence of that failure.

The rules governing commercial disputes in Triple A arbitrations have been introduced, as have been materials concerning ethical precepts for arbitrators in such disputes.

It seems clear to the Court that Morton should have disclosed the relationship or acquaintance with Waldron as soon as he learned that Waldron was likely to be a witness in the case.

It does appear that at the time of accepting appointment as an arbitrator Morton was not aware of Waldron's existence, and that this matter came to his knowledge later, while he was in the course of serving as an arbitrator.

However, as the ethical code indicates, there is a continuing responsibility on the part of arbitrators when such matters arise during the course of arbitration to make such matters known to the parties.

A second degree of relationship between Morton and Waldron is this: Some four years prior to the arbitration Morton had been instrumental in having a seminar specially arranged for employees of his company, with Waldron to be instructor, and at which Waldron did serve as instructor.

This fact, along with the earlier acquaintanceship with Waldron, was not disclosed to the parties.

Here again, this is a matter which should have been disclosed by Morton to the parties when it became known that Waldron would or might be a witness in the cause.

I do not find, however, that the failure to make this disclosure with respect to Waldron, and his prior relationship or acquaintanceship with Waldron, is such as to vitiate the arbitration award.

Even under the opinion written as the Court's opinion in *Commonwealth Coating,* without even considering the concurring opinion, it appears and is so found by this Court that the matter relating to that prior relationship is not of such a nature in its substance and effect as to invalidate the award, or, to do more than at least in this respect point out that it was an omission of something which Morton should have done.

Not every failure to disclose some matter of information is, as I read *Commonwealth Coating*, and the cases which have followed it, such as to make invalid an arbitration award.

Certainly there is somewhat less of a responsibility in that regard as it relates to a witness on the one hand than to a party on the other.

It may be recalled that it was essentially a relationship between an arbitrator and a party that was involved in the *Commonwealth Coating* case, although certainly the principles do apply not only to parties and their counsel, but, also to witnesses, as the ethical code so indicates.

The arrangement between Yeargin and Robbins in November, 1979, deserves certainly attention by this Court.

In November, 1979, Robbins was general contractor for a construction project. One of its subcontractors had certain work as to which scheduling problems existed.

During November, 1979, that subcontractor, without so far as appears from the evidence any input from Robbins, made arrangements with Yeargin to be its sub.

Under the evidence, Robbins had no right to consider and reject the sub of that sub.

The disclosure, however, of that relationship was made known by the intermediate subcontractor to Robbins in mid-November, and it is clear that at some point in November Morton became aware of that relationship with Yeargin.

It is not clear whether he became aware before or after the award rendered, November 20th, 1979.

It is clear, moreover, that in December of that year Morton became active in the Rocky Mountain Hospital

job, in a greater degree, and certainly would have had relationship with Yeargin after that point in time.

This is a close question as to whether the relationship between one of the arbitrator's companies, and a party to the litigation, which arose prior to the award, albeit after close of the hearing, and which may well have been known by this arbitrator prior to the award, is or is not a basis for setting the award aside.

I have concluded and do hereby conclude that that relationship is not such as invalidates the award.

It was according to the evidence a relatively small amount involved in that other matter. It did come at the very tail end of this arbitration proceeding.

It is not a situation where there were regular and recurring business arrangements between an arbitrator's company and a party to the arbitration, such as was involved in the *Commonwealth Coatings* case.

I do find, however, or note that it is a close question. And I simply state that my view is, on balance, taking into account *Commonwealth Coatings,* and the progeny subsequent to that decision, that it is insufficient to call for an invalidation of the award.

The principal attack by P and W upon the award involves a consideration of when and how the arbitration was conducted.

It is appropriate that I now go into some detail concerning the prehearing arrangements for that arbitration, and some details concerning the arbitration itself.

On June 13, 1979, the first pretrial or prehearing conference was held before the panel of arbitrators, who had been selected the preceding month.

The parties appeared by counsel. Discussion was had concerning the status of the case, discovery involved, the issues, and certain rules were established for the continued governance of the arbitration proceeding.

It may be noted that prior to that time discovery had been proceeding under the aegis of the Federal Court case in the Middle District, although that discovery was pursued without any waiver of the right to insist on handling an arbitration on the part of P and W, who was insisting in essence that the Federal District Court ought to get out of the matter, and leave the matter for arbitration, Yeargin taking a somewhat different viewpoint in connection, as I understand it, with certain of the alternative arguments and claims made by it.

The arrangements made on June 13th were outlined in general in a letter by Poppleton, one of the arbitrators, and indeed the arbitrator who acted as principal arbitrator insofar as conduct and management of the hearings and conferences were concerned.

Poppleton's letter of June 18th outlined in various numbered paragraphs certain matters that were to govern further proceedings. One of those paragraphs, and indeed one which becomes critical in this case, related to the setting of a hearing date. September 24th was stated in that letter as being a date scheduled for the hearing of the arbitration.

As it turns out there was later controversy as to whether that hearing date was intended to be firm and fixed, or, on the other hand, was a target date.

The arbitrator indicated later that it was a target date, and that the use of the word "scheduled" for a certain date was intended to imply the somewhat tentative nature of that, with the idea that only by having a target date could

some conflicts or potential conflicts perhaps be avoided, and in order to establish deadlines for the completion of certain discovery and preparation.

It appears that both parties were, given the nature of the other matters discussed on June 13th and their understanding of those matters, reasonably satisfied with the September 24th hearing date, the point of doubt with respect to that date being essentially a question of potential conflict with other litigation, Federal or State Court litigation.

In July, 1979, discovery which had been commenced with some energy back in February of that year continued apace. During the month of July, or perhaps July and August, P and W took eleven depositions of potential Yeargin witnesses. That being added to the ten depositions they had taken of Yeargin witnesses back in February resulted in ultimately P and W's having deposed twenty-one persons, and indeed all but two of the persons whom Yeargin ultimately utilized as witnesses during the arbitration proceeding.

Also during July interrogatories were submitted by P and W to Yeargin, seeking among other things discovery of information under the equivalent of Rule 26, respecting expert witnesses' reports.

During July it also occurred that certain depositions were scheduled at a time when Mr. Elliott, chief trial counsel for P and W, was at Air Force Reserve Camp, a matter which precipitated an objection by P and W, and a ruling by Poppleton on behalf of the arbitration panel that the depositions nevertheless proceed with another member of Elliott's firm being involved, and under a condition that persons so deposed could be redeposed, if desired, by Elliott after reviewing the content of those depositions.

On June 13 it had been specified that each side would submit to the panel and to each other by August 17th a detailed brief or synopsis of its affirmative claim being made as against the other.

At the July 23rd conference held before Arbitrator Poppleton, in which various matters concerning the case and processing of discovery were discussed, an extension of that date was granted, primarily at the request of P and W. The date specified was then rescheduled for August 24th, 1979.

It is appropriate at this point to note that during the July 23rd conference, and indeed at subsequent conferences, Elliott on behalf of P and W took the position that any directives by the panel for the expediting of the hearing must be subject to certain limitations that would enable it, P and W, to present evidence in a manner that it believed most effectively presented its side of the dispute, and that accordingly, while it would endeavor, as had been specified in Poppleton's June 18 letter, to present where feasible testimony in a written form, it nevertheless considered its right to present live testimony as critical to a fair presentation of its version of the critical facts.

This concern was a part of the reason why the submission of the brief or synopsis was rescheduled from August 17th to August 24th. Although not directly in point, it was a part of the same problem, namely P and W's concern that the schedule that had been established should be viewed with consideration towards P and W's difficulties in collecting and presenting its evidence in the case, and indeed its claims in the case.

During the July 23rd hearing the interrogatories that had previously been propounded by P and W were considered by Poppleton on behalf of the panel. Objections

had been made at that point to those interrogatories by Yeargin, taking the position that it would present the expert opinions as a part of the brief and synopsis required to be filed initially by August 17th, as extended to August 24th, and that it should not be required to do so through the form of interrogatories.

Had the interrogatories been answered in that form, the report of the experts sought by that deposition would have occurred, apparently about the 8th or 9th of August, rather than, as it turned out, August 24th.

Yeargin did submit on August 24th a detailed statement of its position. As Elliott had anticipated, it was in some great detail, presenting, as was subsequently described, an impressive set of papers to be filed, whereas the report or claim or brief submitted on behalf of P and W was of a much more limited and summary nature, more comparable to a pleading than to a detailed synopsis of the claim.

Indeed, as it turned out, the panel by later ruling indicated that P and W's submission on August 24th was deemed by it to be inadequate compliance with what had been required in the June 13th conference.

On August 30th, 1979, a prehearing conference was held, with the parties being represented by counsel, and with all three arbitrators being present. This conference was held pursuant to the schedule that had been established back in June, one of the paragraphs of the June 18th letter being the scheduling of this August 30th prehearing conference.

At this conference the parties were requested to and did present an outline of the persons whom they expected to call during the arbitration proceedings, and some brief

outline or description about the general subject area of those persons' testimony.

Consideration was also given as to expected cross-examination periods for those witnesses.

After hearing these presentations on the morning of August 30th, and after having recessed for lunch, the arbitrators returned to announce certain rulings with respect to the hearing.

It may be noted at this point that during this presentation Mr. Elliott indicated there was a potential conflict that he had with respect to a hearing set on September 24th before the Fifth Circuit, two Federal District Court cases scheduled for that week of September 24th and potential State Court litigation the following week.

When the panel returned after lunch to announce its rulings on matters that had been presented to it, it stated that the hearing would be held as previously scheduled, on September 24th, 1979.

It indicated that there would be time limitations placed on the parties so as to enable the arbitration to be conducted within a two week period of time.

Yeargin was allowed or allotted for the presentation of its witnesses, including cross-examination, the first three hearing days.

P and W was then given five days, and then a day was assigned to each for rebuttal.

Recognizing that the parties in their outlines on the morning of August 30th had indicated hearing times substantially in excess of a two week period of time, the panel in effect reiterated what had earlier been said on June 13th, this time placing greater teeth in that admonition.

On June 13th the panel had admonished the parties that, where possible, evidence should be presented on direct by written affidavits, or depositions, or the like, and that live testimony was not generally encouraged, at least not cumulative live testimony.

In the August 30th afternoon hearing the panel in effect said that, if you comply with these directives, you can, we think, present your case satisfactorily within this ten hearing day schedule.

Mr. Elliott on behalf of P and W objected strenuously to both types of rulings, that is, both the failure to grant a continuance, as well as the question as to the satisfactory nature of the claim which he had presented, and, more particularly, to the restrictions on the length of time being allotted to the presentation of his witnesses.

On September 10th, 1979, P and W filed with the Arbitration Association various documents. In summary, the documents requested, first, that its earlier claim be treated as satisfactory for submission; that there be a postponement of the September 24th arbitration hearing date, and thirdly, that the arbitrators be disqualified, or recuse themselves, or be removed—depending upon one's terminology—by reason of alleged bias or favoritism shown during the course of the prehearing matters.

This set of motions was initially referred to the Offices of the American Arbitration Association in New York, but ultimately returned for decision by the arbitration panel.

And on September 17th there was a presentation to the panel of these motions, the parties appearing by way of telephone conference.

The arbitrators ruled at that time, actually by telephone, or telegram, shortly after the conclusion of the

telephone conference that they would not continue the hearing date—that it would be on September 24th.

They made some modification, perhaps it may be called, with respect to the adequacy of the statement of claim filed by P and W, and they denied the request that they be removed, or excused, or disqualified from the hearing.

The proceeding then was begun on the morning of September 24th. Elliott was not there representing P and W. He was rather in Montgomery appearing before the Fifth Circuit in connection with the appellate argument.

P and W was represented on that morning by an associate of Mr. Elliott's law firm, one who had been involved in this arbitration and its preparation, although that associate was a recent graduate from law school, without any extensive experience prior to this matter.

P and W was represented secondly by an attorney from New York who had been representing P and W throughout these proceedings, and who had been shown as counsel along with Mr. Elliott's firm for P and W in the arbitration proceeding, but who also had not been involved in the detailed preparation of the case for arbitration hearing.

Thirdly, P and W was represented by an attorney from another law firm in Birmingham, who has been specially brought into this case in view of Mr. Elliott's expected absence, at least for the morning of September 24th, and in view of the difficulties of readying the case for hearing.

This third attorney was originally contacted on August 30th after the panel decision previously described, had said that he could undertake representation as of August 31st provided, however, Mr. Elliott remain in the case,

and primarily in charge of P and W's interest, and was in fact not brought into active work on the case until September 17th, the time of the telephone conference rulings denying the motion for continuance.

The panel refused on the morning of September 24th to continue the hearing generally, or to continue the hearing until Mr. Elliott could arrive.

The panel did, however, agree that cross-examination of witnesses presented during Mr. Elliott's absence could be conducted after Mr. Elliott returned.

There was daily transcript being taken in this arbitration proceeding, and under the evidence it appears that transcripts of morning sessions were available in the early afternoon of each day and that transcripts of afternoon sessions were available apparently sometime either that night or early the next morning, that matter not being clear from the record.

Mr. Elliott arrived at about 2:30 on Monday, the 24th. At that time Yeargin had presented, I believe it was, three of its witnesses. I may be mistaken as to whether it was three or four. One of those was cross-examined by Mr. Elliott somewhat after his return.

I believe I'm correct that actually there was some additional cross-examination by Mr. Elliott of that very same witness the following morning, because the cross-examination was not completed the afternoon of the 24th, and cross-examination was afforded to Mr. Elliott on the 25th of the other two witnesses who had testified during his absence.

With a minor exception, which need not really be addressed, the other three attorneys for P and W then remained in attendance during the balance of the arbitration proceeding, which as previously indicated was con-

cluded actually early on the morning of Thursday, October 4th. In fact, the parties, utilizing the procedures that had been adopted by the arbitrators, and under the urging and pressure of the arbitrators periodically expressed to move forward expeditiously and not to repeat matters, completed the presentation of evidence in less time than had been allotted by the arbitrators.

This was true both for Yeargin and for P and W.

The basic position of P and W is that from a statutory basis there was a failure of the arbitration panel to grant a continuance when just cause therefor was shown, and from a statutory basis there was a failure to receive evidence as required by the statute, in view of a combination of matters, namely, the procedure adopted by the arbitration panel for the hearing of evidence primarily in a written form, the refusal of the arbitration panel to continue the case from September 24th to a later date, and the limitation by the panel of this ten day hearing period, all of which factors combined, as P and W here presents, to effectively preclude the reception of relevant and material evidence.

P and W also asserts that in effect there was a failure of fundamental fairness in the procedures and in the rulings of the arbitrators, and particularly in its ability, or, rather, inability to effectively counter under the panel's rulings the evidence presented through what has become to be known here as the Sirrine Report and the Waldron Report.

I'm not sure quite where to begin in the sequence or listing of matters claimed to invalidate and impair these proceedings.

Insofar as the failure of the panel to grant a continuance from September 24th until perhaps September 25th, for example, that is, during the period of Mr. Elliott's

absence from the hearing, the Court finds that is not a basis for invalidating the procedure, or the award. Other counsel, varied in abilities and experience and in knowledge of the case and yet in combination certainly competent to represent P and W on that occasion, were present. The procedure adopted involving the cross-examination by Mr. Elliott after his return, in the light of the availability of the daily transcript and of recollections by his co-counsel of the matters that may not necessarily appear in the printed record, were adequate to allow adequate representation of P and W in that manner.

I have carefully reviewed the cross-examination and the direct examination of those witnesses. I am persuaded that there was adequate and effective cross-examination of those witnesses on the part of Mr. Elliott, and on behalf of P and W.

It seems to me that the most that can be said there is that what really happened was that it put extra stress on counsel, and that I do not see any indication of any ineffectiveness in the representation of P and W's interest from that. I do recognize and understand the additional stress it would have placed on counsel both at that time, and in terms of attempting to get back momentum for the balance of the case.

I do not quite understand the position of the arbitrators in not allowing at least a half day's delay in the proceedings. At the same time, I cannot say that it was a mistake or a matter that invalidates the proceedings.

The major concern throughout this case relates to the difficulties faced at the arbitration hearing by P and W in responding to the impact of the Sirrine and Waldron reports.

Sirrine Report and the Waldron Report were certainly of major significance in this arbitration and indeed must be seen, at least the Sirrine Report, as in all likelihood a major basis for the panel's award.

The Sirrine Report was one which essentially evaluated the scope of contract change between May, 1975 flow sheets, and the work as built.

Whether the methodology of that report was correct, or, on the other hand, was valueless, is, of course, a matter that this Court need not determine.

The Sirrine Report attempted to quantify the changes found to the extent they were deemed to be changes in scope, in terms of man hours to which then dollar rates to be applied as appropriate under the circumstances.

The evidence in this case presented before me in these combined cases is to the effect that to have reviewed the Sirrine report and prepared a detailed critique and evaluation of that report, being able to outline not only problems involving methodology or assumptions or logic or perhaps even isolated errors, but to go beyond that and to in effect give a total review and comparable study by other consulting firm, would have taken time estimated at from three months and up. The particular experts have disagreed only slightly in their estimates as to the length of time.

Yeargin has put on an expert indicating that a somewhat different type of critique could be accomplished in less time, such as fifteen working days. That report, as I view it, is not quite the same kind of report as what was being addressed by the experts presented by P and W.

The basic position by P and W is that despite earlier requests for the Sirrine Report, including interrogatories filed in July, it did not receive the Sirrine Report until

August 24th, just thirty days prior to the commencement of arbitration proceeding, and only forty days prior to the actual last day permitted for the arbitration proceeding.

This was, it says, an inadequate time which should have justified when that matter was called to the attention of the arbitration panel a continuance; that the failure to grant that continuance resulted in the panel's not receiving evidence, contrary to the statute, because of its, P and W's, inability to provide that evidence; and that indeed, in terms of fundamental fairness, considering the important nature of the Sirrine Report, the arbitration proceedings cannot be considered as valid and binding.

Yeargin counters by saying that the nature of the dispute concerning the scope of work, and its financial impact, was an important issue throughout the entire proceedings; that P and W could have, as it did, undertake in such a study back in February or March of 1979; and that if it had, by the testimony of P and W's own experts, those firms could have themselves made such a study.

Yeargin in effect discounts the need as here asserted by P and W for those opinions by consulting firms to directly address the Sirrine Report, asserting that the period required for comparing two studies is not the only way by which the evidence from one side can be countered by the other.

The Court has been told that consultation was undertaken by counsel for P and W relatively early, at least back in March, I believe it was, of 1979, concerning the undertaking of such studies in the effort to be prepared for the Sirrine Report or something of that order; that a decision was made based in large part upon the recommendation of those consultants not to undertake a study until Yeargin's study, that is, that of Sirrine was available

for comparison and critique; and that in essence it decided to follow the advice of the outside consultants, while at the same time attempting to expedite when it would receive the Sirrine report.

It does not appear, the Court would have to say that there was total communication between counsel for P and W and the experts who were consulted by them in terms either of the length of time that such a study would take by the consulting experts, following receipt of a study such as the Sirrine Report or, on the other hand, when the scheduled hearing date was. It is not clear, at least from the evidence, whether that information was sufficiently shared between the two, so that there was an awareness that an adequate rebuttal as they viewed it to the Sirrine Report could not be accomplished within the time frame that was scheduled by the panel on June 13th.

Up until August 30th the only opposition by P and W to the proposed scheduled hearing on September 24th was in terms of potential conflicts with other cases and litigation. Up until August 30th, 1979, there was no presentation by P and W of inability to prepare and to present its case at an arbitration proceeding that would commence September 24th, and this is so even though the Sirrine Report was not received until August 24th, and indeed P and W's counsel was on notice that it would not in all likelihood be received until August 24th, that knowledge having occurred really as a result of the July 23rd conference in which there was a setting off of the submission date and a denial of the request for interrogatory information.

In fairness, however, it must be said that so long as Mr. Elliott was not of a belief that in fact the arbitration proceedings would be conducted and concluded within any such period of time as two weeks, for example, one might

reasonably have expected, if the arbitration proceedings themselves were to last over a several month period of time, that there would perhaps be enough time from the receipt on August 24th of the Sirrine Report until the time there would be a need to present rebuttal testimony during an arbitration proceeding.

The Court certainly can understand that up until the decision of the panel on August 30th, both fixing the date of September 24th as certain and at the same time restricting the length of the hearing, that it was not at that point necessarily any dereliction of duty not to have called to the attention of the arbitration panel the potential inability to have the kind of reports which P and W wished to present.

It is perhaps appropriate in this conjunction, without yet making certain more ultimate findings in this matter, to consider the companion or related question; namely, the procedures adopted by the panel for hearing this arbitration, that is, the preference and pressure by the arbitration panel upon the parties to present their direct evidence in a written summation form, whether by affidavit, or deposition, leaving for live examination essentially the cross-examination, with certain conditions and specifications.

Much is said here by P and W in opposition to that practice. However, I believe that practice to be allowable as a practice of an arbitration panel. It is not, as I view it, a denial of any fundamental process or rights of process of fair hearing to have such a mode of presentation of evidence, particularly where, as here, the panel provided a procedure for live cross-examination, generally imposing the duty upon the one who would present the written testimony to have that person available for live cross-examination.

And while I certainly understand the irritation that must have been felt periodically by counsel for both sides with some of the remarks made by Arbitrator Barge, I do not conclude that that aspect of the hearing, that is, his pressure for continued expediting of presentation and his comments to counsel to be that which would in any way invalidate the proceedings.

The Court had to note with humor the interplay between the arbitrators, when at times one arbitrator would object to another's questions as either being repetitive or unclear or the like; and the Court has to note that, while perhaps the majority of Mr. Barge's caustic comments were directed at Mr. Elliott, it's not clear that this is so. I didn't count them, but there was a sufficient number directed at various parties that I do not see in that the kind of question of partiality that might somehow invalidate the proceeding. One of the questions that has been argued and presented here is that, although the five days and the one day allotted to P and W were not totally utilized—indeed there was about a three or four hour period on a Friday that in effect was assigned apparently as additional time to P and W, which went unused—that, nevertheless, the combination had the effect of prohibiting or not allowing P and W to present all of the witnesses that it would have liked to have presented.

Yeargin argues that in effect this position can't be adopted, because P and W didn't utilize its full time. I would reject that type of argument by Yeargin, Counsel for P and W were under the constraint to present all of their essential evidence dealing with their case in chief and in rebuttal of the claims made by Yeargin in a five day period, allowing for cross-examination. The mere fact that it took somewhat less than that five days in which to do that does not mean that they did not, or might not

have missed certain witnesses they would certainly have put on had the time not been so structured.

In this connection, it has to be noted that one cannot be that sure of how long the opposition's cross-examination is going to take, and certainly, while the litigation, or arbitration was of major importance to both companies, it didn't justify having at all times a great overflow of possible witnesses available who could not realistically be expected to testify.

At the same time, insofar as it is claimed that P and W really didn't get to use some of these other witnesses that it could have used or would like to have used, the Court has to conclude here that the method for presentation suggested by and urged by the panel would have, had P and W chosen to make more use of that procedure, enabled P and W in effect to have far more time than it did. For example, Mr. Boyhan's testimony could, much of it, have been presented by way of the affidavit process emphasized by the panel, which would have given additional time, if that was desired, for other witnesses.

P and W had its own reasons, obviously, for wanting witnesses to testify live, and I do not challenge, and I have not heard Yeargin here challenge, the wisdom of that decision. It is essentially a tactical decision, and I cannot say the decision was not the best decision to have made. But, simply in terms of the question of arguing about not having enough time, the Court has to conclude that there was enough time provided for P and W's witnesses, if P and W had chosen to follow more closely the method followed by Yeargin, and the one which the arbitrators had certainly urged and suggested.

I return to the question of the Sirrine Report, which I had left to get into this question of whether there was evidence precluded by way of the procedures adopted.

There are many ways of contradicting evidence presented by experts, no one of which certainly is appropriate in all circumstances.

The Court has no difficulty with the position of P and W, that it would have preferred to have at least had a study, one or more made, concerning the Sirrine Report, or the Waldron Report, which was in sufficient detail in effect to have been parallel to it, and showing some glaring errors in logic, or mathematics, or the like, even on the same methodology.

The time for that certainly was not available under the procedures as adopted by the panel. There was, however, time for a modified approach to that, whether in terms of some sampling of results, as well as a critique of basic methodology. And indeed, there was opportunity for the basic presentation of other expert opinions concerning the source of materials relied upon, the basic methodology and approach adopted by Sirrine or by Waldron.

Indeed, as I read through the transcript of the proceedings, there were more than one such witness presented by P and W to the panel whose testimony cast significant doubt on the validity and weight of both of those reports.

It may well have been, and one must surmise from the result of the arbitration proceeding, that such evidence did not sufficiently impress the arbtirators to the point of rejecting the Sirrine Report.

The Waldron Report, it appeared to me, was—close to the words used in the brief filed by P and W essentially destroyed by his own testimony and by other evidence in the case. It is, of course, not for this Court to decide or to redecide the merits of the controversy, nor, in this am I saying that there could not have been

prejudice to P and W in terms of the ultimate result of the arbitration proceedings by not having had the type of report it would like to have had.

It certainly would have had time, however, to have presented someone else's study in written form, such as might duly impress the two engineering types on the arbitration panel, showing in comparison with the Sirrine Report, although not patterned after it and although adopting the approach of other engineering firm, what changes in scope of work were deemed to have occurred and what the economic impact of that was, and likewise in connection with the Waldron report, the effect of scheduling problems and the like.

In this connection, it is perhaps due to be noted that, as I view it, the Waldron report had two major purposes, one of which was, to be sure, the presentation of evidence in support of certain of the claims made by Yeargin against P and W in connection with the overtime and inefficiency claims. A major purpose of that report also was in rebuttal of claims made by P and W to the effect that Yeargin was behind schedule, thereby justifying termination and thereby justifying P and W's claim in chief.

There is no requirement, as I view it, that in each arbitration proceeding there be, for fundamental fairness to be accomplished, an exchange of information of this sort. It appears to me that the panel did achieve a modicum in that area, not perhaps the type I would have provided had I been sitting on it, whether as arbitrator, or as judge in a court proceeding. That, however, is not the standard by which this matter is to be reviewed by me. I conclude that there was no violation in this regard such as would invalidate the arbitration proceeding, and arbitration award.

I am not sure that I have gone through each of the claims made by P and W. I know I have thought about each of the claims, but I may not have recited them in these findings and conclusions.

As counsel are perhaps aware, I never ask counsel at the conclusion of one of these dictations in any way to indicate an agreement with the Court, nor certainly to waive any rights they have.

My decision will be in favor of Yeargin, plaintiff in Case 79-1447, and in favor of Yeargin, the Defendant, in Case 79-1322.

The request for attorneys' fees by Yeargin in either or both cases is denied.

I do ask counsel again, without any waiver of rights to file post hearing reviews with this Court or to take appellate review, to let me know if there is some matter of fact or issue that I haven't touched upon or covered which should be, or if there was some confusion basically in what I have said, again not asking any waiver of the right to object.

MR. NACHMAN: Your Honor, as I understood the Court, there was a reference to the statute, the Arbitration Act as Title 10, I believe, and I think it's Title 9 of the United States Code.

THE COURT: Maybe it's Title 9, Section 10.

MR. NACHMAN: Section 10, yes, sir.

THE COURT: All right.

• • •

Any other questions?

There is one matter that perhaps I should have recited, and that is, Mr. Elliott had other conflicts, namely in the Federal and State Court, that were presented in connection with his request for a continuance on August 30th, 1979. The two Federal cases set the week of September 24th, 1979, were continued as a result of his or his law firm's effort in that regard. There is no indication as to what happened with respect to the State Court cases set for the week of October 1st, other than whatever happened to them did not apparently require Mr. Elliott's presence on those cases, because he was in attendance at the arbitration hearing during those times.

Were there any other matters?

I might make this comment, as to who should make the decision concerning a request for excusal, or recusal, such as was presented by P and W on September 10th, 1979. There is to some degree a conflict between the rules of the Association, Section 18, on the one hand, and the Canons, Canon 2 for Commercial Disputes, on the other. Section 18 indicates that matters going to alleged bias would be submitted to the Arbitration Association and apparently decided by it, although with a copy, in the discretion of the Arbitration Association, being directed to the panelists themselves. Canon 2 of the Canons indicates that matters going to their bias and the other matters listed, including partiality, are matters which apparently the arbitrators may decide for themselves and standards are given.

In Section 18 there is not included in the description of matters that would go to the Arbitration Association for decision alleged questions of partiality. That is contained in Canon 2, relating to what arbitrators would deal with themselves.

There is an overlap between the two sections when one talks about bias and certain other matters as it relates to alleged partiality. That is included only in the Canon 2 item for decision by the arbitrators themselves.

Considering the timing of these several motions of September 10th, 1979 and the scheduled hearing dates, September 24th, 1979, and considering that for the most part what was at the heart of the motions was a partiality claim dealing with certain rulings, I would say that they were due to be decided by the arbitrators themselves rather than by the Triple A, and that there was logic on the part of the Arbitration Association to send this type of request, under the circumstances, to the arbitrators for decision. I do recognize, however, this conflict area in the two sets of written matters, the Canons on the one hand and the Rules on the other.

I am looking through the list of issues—I certainly should have mentioned that the request for continuance of the hearing on September 24th, that request having been made on August 30th, and renewed on September 10th, were opposed in each instance by Yeargin, so, this was not a situation of the parties having jointly requested a continuance.

There was a question as to whether Poppleton was guilty of prejudicial misconduct in failing to disclose his knowledge concerning Morton's relationship with Waldron. It perhaps follows from what I have already said that that was not prejudicial misconduct, this following in part from the ruling relating to Morton himself.

There has been a complaint that the time of the hearing, that is, its date as well as its length, was arbitrarily arrived at by the arbitrators, giving, in effect, priority to their own scheduling, and not adequate consideration

of the interest of the parties, and that there was a misleading of the arbitrators at the time of the initial appointment.

There is much in what was said during some of these proceedings by Mr. Barge that is supportive of that claim, and, indeed, that is one of the major reasons why I would decline to award attorneys' fees in this case as Yeargin has requested.

The Arbitration Association should have under its rules described to the arbitrators prior to their selection and acceptance an estimate as to the length of time, or a least some greater description of the case than what was given. Apparently only to Poppleton was there given any kind of general statement about the length of the case, other than it was a bid case. The failure of the Arbitration Association to do that certainly should not be condoned. It does not, however, in and of itself invalidate any proceedings.

However, if there was an arbitrary giving of preference to their own schedules contrary to the positions of the parties, and indeed contrary to the requirements of fair process, then, that would be another matter.

In reviewing with care what was done and said by the arbitrators in prehearing conferences and during the arbitration hearing itself, while dismayed with some of the comments made from time to time, particularly by Mr. Barge, the conclusion I must reach is that the retention of the September 24th date was not an arbitrary preference to their own schedules. Both Morton and Poppleton testified, and I credit that testimony, that they could have handled the matter later during the year. Mr. Barge indicated that his schedule was crowded, and was

perhaps not nearly as clear on this point as the other two arbitrators.

Insofar as the length of time is concerned, notwithstanding their admonitions periodically expressed to counsel to move on, get going, not be repetitive, it was, in my evaluation of what happened, a pressing of the parties to be more efficient and expeditious in the presentation of evidence, and indeed, had they thought and concluded that a longer period of time was required in order for fair presentation, they would have afforded that length of time.

The problem is that they thought that the case could be fairly presented in ten days time, and, given that belief and opinion, they made every effort to get the parties to present it within that period of time. I do not believe, and I would find to the contrary, that they restricted it to ten days because that's all "they had to give to the arbitration." I think a more correct reading of it is that that is all at least Mr. Barge was willing to give to the arbitration as he understood the issues and how it could be presented within that ten day period.

That has been a major point, and I think I needed to cover that in my findings.

The Clerk will be and is directed to enter judgment in favor of Yeargin in both cases, in each case taxing costs against Parsons and Whittemore.

MR. STARNES: May it please the Court, for the purpose of the record, as I understand from what Your Honor has said, I am not called upon to say anything, comment upon it? I think obviously the Court knows that I am very disappointed in the decision without my saying so, but, that in my silence I'm not waiving any

rights that my client may have to take any future action that it may deem appropriate?

THE COURT: Certainly no waiver, and it was really just to see if there were some areas of omission or commission about findings or issues that should be covered, if for no other reason than to give you additional matters on which complaint or appeal might be taken.

All right.

END OF PROCEEDINGS.

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT upon counsel for all parties, by depositing a copy of same in the United States Mail, postage prepaid, addressed as follows:

Mr. Roland Nachman, Jr.
Suite 809
First Alabama Bank Building
Montgomery, Alabama 36101

Mr. O. G. Calhoun
Haynsworth, Perry, Bryant,
Marion & Johnstone
Suite 409, East North Street
Greenville, South Carolina 29602

This 13th day of December, 1982.

.....

FRANK C. JONES

82-941

No.

Office - Supreme Court, U.S.
FILED
DEC 8 1982
ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PARSONS & WHITTEMORE ALABAMA MACHINERY AND SERVICE CORPORATION and PARSONS & WHITTEMORE, INC.,
Petitioners,

vs.

YEARGIN CONSTRUCTION COMPANY,
Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

M. ROLAND NACHMAN, JR.
P.O. Box 668
Montgomery, AL 36101
(205) 834-2222
(Counsel of Record)

O. G. CALHOUN
P. O. Box 2048
Greenville, S.C. 29602
(803) 271-7970
(Counsel of Record)

STEINER, CRUM & BAKER
P. O. Box 668
Montgomery, AL 36101

HAYNSWORTH, PERRY, BRYANT, MARION & JOHNSTONE
P. O. Box 2048
Greenville, S.C. 29602
Attorneys for Respondent

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

Did the court below correctly hold that an arbitration award should not be set aside under 9 U.S.C. § 10 for "evident partiality or corruption" of one of three arbitrators when:

(a) He was not aware of any relationship, direct or indirect, with any party;

(b) His only other "relationship" was, at best, a trivial connection with a witness; and

(c) The court found that there were no personal, financial or associational ties that would affect his impartiality.

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vs.

YEARGIN CONSTRUCTION COMPANY,
Respondent.

On Petition For Writ Of Certiorari To The
United States Court of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

OPINION BELOW

By direction of the court below, the opinion of the United States Court of Appeals for the Eleventh Circuit was not published.[1] This unpublished opinion appears in the appendix to the petition.

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[1]Omitted from the first page of the opinion below reproduced in the appendix of the petition is the following: *"DO NOT PUBLISH"*. The internal operating procedures promulgated by the Eleventh Circuit provide: "Opinions that the panel believes to have no precedential value are not published. All non-published opinions and affirmances without opinion under 11th Cir. R. 25 are printed in table form in the Federal Reporter." (p.15).

JURISDICTION

The petition contains the relevant dates. Jurisdiction of this Court is conferred by 28 U.S.C. § 1254.

STATUTES INVOLVED

Relevant statutory provisions of the Federal Arbitration Act, 9 U.S.C. §§ 9 and 10 are contained in the appendix to the petition. The relevant portion[2] of Rule 52(a), Federal Rules of Civil Procedure is also involved.

STATEMENT OF THE CASE

Respondent refers to the opinion of the court of appeals below which appears in petitioners' appendix.[3]

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[2] "...Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses...."

[3] In the last paragraph on page A-2 of that opinion, there is an obvious typographical error which is irrelevant to the issues presented by the petition, namely, the figure "$2 million" should be "$20 million". See transcript of proceedings in district court, p. 612.

REASONS FOR DENYING THE WRIT

Petitioner has failed to present any "special or important reasons" for the grant of certiorari and has failed to invoke any of the criteria specified in Supreme Court Rule 17.1(a) and (c); there is no conflict with a decision of another federal court of appeals; there is no suggested departure "from the accepted and usual course of judicial proceedings;" and the decision below accords with applicable decisions of this Court. Exacerbating this circumstance, P & W[4] questions here findings of fact of the district court which the court of appeals below held to be "correct" and "strong[ly] support[ed]" by the testimony. (A-5, 16)

P & W seeks review to overturn the holdings of the court below and the district court that asserted undisclosed "relationships" of one of three arbitrators, Morton, were insufficient to vitiate the arbitral award. One of these asserted "relationships" was described by the court below (A-16):

> "Harrison International Corporation was a subcontractor on a portion of a hospital construction job in North Carolina. Robbins Corporation, of which Morton was vice president, was general contractor on the job. Harrison, without participation by Robbins, subcontracted a small portion of its work to Yeargin . . ."

The court below termed the asserted relationship "indirect", and held that the testimony "reveals strong support for the conclusion that Morton was unaware of [it]." (A-16, 17)

The other asserted "relationship" was that one Waldron, an expert witness for Yeargin at the arbitration hearing, had lectured at a two day seminar attended by Morton "ten to fifteen

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[4]Respondent, as did petitioners, will refer to petitioners as "P & W" and respondent as "Yeargin."

years prior to the hearing;" and that "some five years before the hearing Morton arranged for some employees to attend a seminar conducted specially for them by Waldron."(A-13) The court below held that this "relationship" was "insufficient to vitiate the arbitration award," since it did not involve "personal, financial or associational ties that would affect the impartiality of the arbitrator." (A-16)

The court below correctly distinguished the trivial connection between Morton and Waldrop from the situation involved in *Commonwealth Coatings Corp.* v. *Continental Cas. Co.*, 393 U.S. 145 (1968). Although P & W characterized the relationship in *Commonwealth Coatings, supra,* as "sporadic"[1], the plurality opinion of this Court found it markedly different. The circumstances involved the neutral arbitrator and a party, not a witness; and the plurality opinion held that this arbitrator, moreover, had received "patronage" from one of the parties which "was repeated and significant, involving fees of about $12,000 over a period of four or five years, and the relationship even went so far as to include the rendering of services on the very projects involved in this lawsuit." (393 U.S. at 146)

The correctness of the decision below is emphasized in the concurring opinion of Justice White (at 150-151):

> "The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function. (Cit.) This does not mean the judiciary must overlook outright chicanery in giving effect to their awards; that would be an abdication of our responsibility.

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[1]Petition, p. 7.

> But it does mean that arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial. I see no reason automatically to disqualify the best informed and most capable potential arbitrators."

Although P & W suggests how "other courts have viewed *Commonwealth Coatings*"[6], the only case there cited antedated *Commonwealth Coatings* by ten years. The fact is that the decision below accords with those of numerous courts of appeals, namely, that evidence of bias or interest of an arbitrator "must be direct, definite and capable of demonstration rather than remote, uncertain or speculative."[7] No court has disagreed.

Indeed, this Court last term in *Smith* v. *Phillips*, ____ U.S. ____, 71 L. Ed.2d 78, reversed lower federal courts which had vacated a state murder conviction on the ground of a failure to disclose knowledge in advance of trial that one of the jurors had applied to the prosecuting attorney's office for a job as an investigator. This Court held that a failure to disclose this circumstance to the defense was no ground for vacating a jury verdict of guilty.

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[6]Petition, p. 11.

[7]*Ormsbee Development Co.* v. *Grace*, 668 F.2d 1140, 1147 (10th Cir. 1982); *Tamari* v. *Bache Halsey Stuart*, 619 F.2d 1196 (7th Cir. 1980), *cert. denied*, 449 U.S. 873; *Andros Compania Maritima* v. *Marc Rich & Co., A.G.*, 579 F.2d 691 (2nd Cir. 1978); *International Produce, Inc.* v. *A/S Rosshovet*, 638 F.2d 548 (2nd Cir.), *cert. denied*, 451 U.S. 1017; *U.S. Wrestling Federation* v. *Wrestling Div. of A.A.U.*, 605 F.2d 313 (7th Cir. 1979).

CONCLUSION

Accordingly, P & W has failed to advance any reason for the grant of certiorari and, for the foregoing reasons, it is respectfully submitted that its petition should be denied.

Respectfully submitted,

M. ROLAND NACHMAN, JR.
P. O. Box 668
Montgomery, AL 36101

O. G. CALHOUN
P. O. Box 2048
Greenville, S.C. 29602

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing Brief of Respondent in Opposition upon counsel for all parties, by depositing a copy of same in the United States Mail, postage prepaid, addressed as follows:

Mr. Griffin B. Bell
Mr. Frank C. Jones
King & Spalding
2500 Trust Company Tower
Atlanta, Georgia 30303

Mr. James E. Clark
Mr. Thomas R. Elliott, Jr.
London, Yancey, Clark & Allen
2100 First National Southern
Natural Building
Birmingham, Alabama 35203

This 7th day of December, 1982.

O. G. Calhoun